

IN THE MATTER OF SIMON EDMUND JOHN KABERRY, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr. K. I. B. Yeaman (in the Chair)
Mr. A. H. Isaacs
Lady Bonham Carter

Date Of Hearing: 27th July 1995

FINDINGS

of the Solicitors' Disciplinary Tribunal
constituted under the Solicitors Act 1974

An application was duly made on behalf of the Solicitors Complaints Bureau by Geoffrey Williams solicitor of 36 West Bute Street, Cardiff CF1 5UA on 11th May 1995 that Simon Edmund John Kaberry of Leeds LS16 might be required to answer the allegations set out in the statement which accompanied the application and that such Order might be made as the Tribunal should think right.

The allegations were that the respondent had been guilty of conduct unbecoming a solicitor in each of the following respects namely that he had -

- (a) drawn monies out of client account otherwise than in accordance with Rule 7 of the Solicitors' Accounts Rules 1986 contrary to Rule 8 of the said Rules;
- (b) paid his own money into client account contrary to Rule 6 of the Solicitors' Accounts Rules 1986;
- (c) failed to produce books for the accounts inspection when properly required to do so, contrary to Rule 27 of the Solicitors Accounts Rules 1991;

- (d) drew monies out of client account contrary to Rule 8 of the said Rules;
- (e) failed to deliver accountants reports, notwithstanding the terms of Section 34 of the Solicitors Act 1974 and the Rules made thereunder;
- (f) practised as a solicitor whilst in breach of a condition imposed upon his Practising Certificate;
- (g) practised as a solicitor without a Practising Certificate;
- (h) failed promptly to redeem mortgages;
- (i) deceived clients as to his failure at allegation (h) above.

The application was heard at the Court Room No. 60 Carey Street , London WC2 on 27th July 1995 when Geoffrey Williams, solicitor and partner in the firm of Messrs. Cartwrights, Adams & Black of 36 West Bute Street, Cardiff, CF1 5UA appeared for the applicant and the respondent did not appear and was not represented. The Tribunal had received a letter dated 19th July 1995 from Messrs Freeth Cartwrights Hunt Dickins of Nem House, 34-44 Bridlesmith Gate, Nottingham, NG1 2GQ seeking a general adjournment of the disciplinary proceedings brought by the Law Society against the respondent.

The letter disclosed, inter alia, that West Yorkshire police were conducting an investigation into the respondent's affairs, however no charges had been laid. The respondent denied the allegations made by the applicant.

The Tribunal was also in receipt of a letter from the respondent himself of 26th July 1995. The respondent said that the letter written on his behalf was written on the understanding that it was to remain privileged and private and was for the eyes of the Tribunal alone.

The clerk to the Tribunal also reported to the Tribunal that Mr. Kaberry had telephoned the Tribunal's office on the day prior to the hearing saying that if matters were to be aired in public then the letters written to the Tribunal were withdrawn.

The Tribunal accepted the concern of the respondent about letters in support of his application for an adjournment as to a certain extent this might have disclosed his defence to criminal charges that might be brought.

The respondent was not available to put his case and in order that it might properly give due attention to the letters written, in fairness to the respondent, the Tribunal of its own motion decided that the application for the adjournment should be heard in private.

The applicant opposed the adjournment application; he was ready to proceed to a full hearing.

He reminded the Tribunal of the case of *The Solicitors Disciplinary Tribunal ex parte Gallagher* in the Court of Appeal when judgement was given on the 30th September 1991. There was a public interest in the expeditious pursuit of disciplinary proceedings against professional men. It was also in the interest of the solicitors' profession that such matters

should be attended to without delay. In this particular matter no criminal proceedings were in existence at the time of the adjournment application. The respondent had not been charged with anything and there was no certainty that he would be charged and if so what those charges would be. Although the letters before the Tribunal discussed the respondent's health there was no medical evidence available.

The applicant would allege dishonesty and the deceit of lay clients. In the matter of the Solicitors Disciplinary Tribunal *ex parte* Gallagher, Mr Gallagher had been charged and was awaiting trial. In those Disciplinary proceedings dishonesty was not alleged. The Tribunal had before it a transcript of the judgement of Lord Justice Parker and was particularly referred by the applicant to the following passages:-

"It is perfectly plain in my view that the Disciplinary Tribunal if faced with a situation where for example they were about to make a Finding and Order a day or two before the criminal proceedings began might well consider that to do so would "*muddy the waters of justice*". They might then say that they would not reach a conclusion until after the criminal proceedings had been disposed of, or they might simply reserve judgment, which they are entitled to do under the Rules, pending the hearing of the criminal proceedings; in another case there might be a completely remote chance of the criminal proceedings being prejudiced."

"In my judgement, the criminal trial not being estimated to come on for hearing for at least a year, these matters are very remote. One matter in which there might have been some substance, in my judgment, is Mr Allen's submission that when the trial comes on some local paper might dig up a previous Order and Finding against the defendant and publish it so that the jury might see it and possibly be influenced. If that were to happen - and I am prepared to accept that it is a possibility - that is a matter that would no doubt be dealt with perfectly properly by the Judge at the criminal trial."

"It is also accepted that there is a public interest in that complaints against solicitors, perhaps particularly complaints of the nature which were made in disciplinary charges, should be disposed of quickly and that solicitors who are subjected to such charges, particularly when the facts are admitted, should not practise in the meantime."

" It is submitted that this is a case where the Tribunal had itself suggested that it would be helpful for the future if the court were to give some guidance. It is hardly necessary to say that, where a discretion is in its terms unlimited, the courts frequently said that to lay down rules of guidance is undesirable as it is seen to fetter the discretion. All that can be said here is embraced in the passage of the Master of the Rolls' judgement extended to cover criminal proceedings as well as civil proceedings. Each case would depend upon the facts and if it appears that to allow the proceedings to go forward would muddy the waters of justice, then it would be appropriate to adjourn them or to take some other course to ensure that those waters were not muddied. But there is an infinite variety of facts and it must be left to the Solicitor's Disciplinary Tribunal to proceed on the basis that I have suggested."

The Tribunal retired to consider the submissions of both parties. The Tribunal decided that the interest of the public and the good reputation of the solicitor's profession out-weighed any likely prejudice to the respondent, which the Tribunal recognised as being extremely remote

and able to be dealt with at any criminal trial. Therefore the Tribunal Ordered that the application for adjournment should not be granted and that the Tribunal would go on with the full hearing which would take place in the usual way in public.

The evidence before the Tribunal included the oral evidence of Mr Angus Halton.
(Investigation Accountant)

At the conclusion of the hearing the Tribunal ORDERED that the respondent Simon Edmund John Kaberry of , Leeds LLS16 solicitor be Struck off the Roll of Solicitors and they further ordered him to pay the cost of and incidental to the application and enquiry, fixed in the sum of £11, 221.13 inclusive.

The facts are set out in paragraphs 1 to .. hereunder:-

1. The respondent, born in 1948, was admitted a solicitor in 1974. At the material times he practised as a solicitor on his own account under the style of Simon Kaberry & Co. at 9 East Parade, Leeds.
2. Upon notice duly given to the respondent an inspection of his books of account was carried out by an Investigation Accountant of the Law Society. The Tribunal had before it a copy of an extract of the report of the Investigation Accountant dated 21st July 1992. The respondent had confirmed to the Investigation Accountant that he had practised alone since 1986 and conducted a general practice assisted by an unadmitted staff of five. Details of the firm's bank accounts were set out.
3. It was reported that the books were not in compliance with the Solicitors Accounts Rules.
4. A list of liabilities to clients as of 31st December 1991 was produced for inspection. The items were in agreement with the balances in the clients ledger and totalled £406,181.84. A comparison of that figure with cash held on the client bank account at that date, after allowance for uncleared items, revealed the following position:

Liabilities to clients	£406,181.84
cash available	<u>£390,328.28</u>
cash shortage	<u>£15,853.56</u>
5. The cash shortage had arisen because debit balances on clients ledger accounts totalled £46, 193.77, the respondent had introduced personal funds in the sum of £28,961.28 and there was a book difference, being a surplus, of £1,378.93.
6. The debit balances had arisen on account of thirty-one clients between 14th November 1990 and 19th December 1991 when overpayments varying amount between 41 pence and £26, 761.77 had been made. The largest overpayment had arisen when the respondent had been called upon to return a mortgage advance he had received from a building society and inadvertently he had returned the sum twice.
7. Another shortage had arisen when, on the instructions of his client, he had failed to countermand payment for £7, 465.65 he was making on behalf of the client on 14th

November 1991 and in consequence insufficient funds remained on the account to meet the 19th December 1991 payment.

8. The respondent had introduced personal sums into client bank account. On the 1st December 1991 the respondent lodged £120,000.00 into client bank account being part proceeds of his interest in his father's estate. That payment was credited to a client account entitled "S Kaberry General 1991" and placed it in credit by that amount. Thereafter the following client account payments were charged thereto -

1991

			Debit	Credit	Balance
i)	1st Nov.	S. Kaberry		120,000.00	120,000.00 CR
ii)	1st Nov.	Repayment of twenty three debit balances	68,038.72		51,961.28 CR
iii)	4th Nov	S Kaberry	5,000.00		
iv)	4th Nov	Transfer Office	2,000.00		44,961.28 CR
v)	5th Nov	Transfer Office	1,500.00		43,461.28 CR
vi)	6th Nov	S Kaberry	2,500.00		40,961.28 CR
vii)	7th Nov	S Kaberry (loan to S)	7,000.00		33,961.28 CR
viii)	8th Nov	S Kaberry	3,000.00		30,961.28 CR
ix)	15th Nov	S Kaberry	2,000.00		28,961.28 CR

1992

	17th Feb	Recovery from client Mr G repaid by Mr Kaberry in ii) above		9,009.57	37,970.85 CR
	13th Mar	Repayment of B debit balance (money returned to Building Society twice)	26,822.47		11,148.38 CR
	13th Mar	Repayment of A debit balance	7,433.26		3,715.12 CR

9. Due notice having been given, the Investigation Accountant of the Law Society attempted a further inspection of the respondent's books of account. Mr Halton had attended at the respondent's offices to begin his inspection on the 2nd March 1994 and his report was dated 5th April 1994. The respondent had not attended at the time and place arranged but instructed members of staff to give Mr Halton access to the client files at his office. Further arrangements had been made to see the respondent on the 18th March 1994 but again he did not attend. In written correspondence the respondent said he had practised alone since 1986 and employed a staff of two.
10. On the 22nd March 1994 the police entered the respondent's home and office addresses and seized documents relating to "possible mortgage fraud".
11. On 23rd March 1994 the relevant committee of the Solicitors Complaint Bureau (the Bureau) resolved to intervene in the respondent's practice on the grounds of suspected dishonesty and abandonment.
12. Mr Halton was able to set out details of the respondent's bank account and he was provided with the clients' cash books for the period from 1st December 1993 to 31st January 1994. No other books of account were produced during the inspection. The

respondent intimated that the books were with his book-keeper but they were not produced at the time of the inspection. Mr Halton confirmed that he had not met the respondent during the course of the inspection but had communicated with him either in writing or through members of his staff.

13. In view of the absence of books Mr Halton did not consider it practicable to attempt to compute the respondent's total liabilities to clients. Mr Halton was able to compute a minimum liability of £267,761.64 which existed on client bank account as at 31st January 1994 in respect of six clients alone. A comparison of the total of those six liabilities with cash available according to the bank certificate (£55,908.60) revealed a minimum cash shortage of £211,853.04.
14. The minimum shortage was not rectified. The Investigation Accountant had been handed a letter, purported to have been written by the respondent, whilst at the police station. The Tribunal was told that that subsequently the respondent had indicated that the letter had been written under duress of some sort and the applicant did not rely upon its specific contents, but felt it was helpful as background if the Tribunal were to consider the following paragraphs -

"Somehow, in the last 3 years, but especially in the last year and since my books were inspected in June 1992, everything I have touched has turned to disaster. I have created a horrible mess which I could not face or overcome. I have simply tried to windmill everyone's money. I have no hidden nest egg. I have not been on holiday at all. I live in a tip and I don't think my lifestyle has been at all lavish. There has been no lady in my life to whom I have given gifts etc. The money has simply gone: most of it gambled in the desperate attempts to win back losses. I don't know how the shortfall of 1990 first arose. I hadn't taken anything. I had no need to. In 1988/89 I had loads of money from my successful betting on the National, Guineas, Derby and Oaks. Who took that money - we'll never know. That was the start of the problem."

15. The respondent's final paragraph in that letter was as follows -

"This, I hope, is the end of it. Much is from recollection. I can only again say how terribly sorry I am. I don't know how it all started, but by summer of 1993 I was in a state of utter despair."

16. The respondent's Accountant's Reports for the years ending 30th June 1992 and 30th June 1993 were due to be delivered to the Law Society by 31st December 1992 and 1993 respectively. The respondent failed to deliver the said Reports.
17. The respondent's Practising Certificate for the remainder of the practice year commencing 1st November 1990 (which Certificate was granted to him on 12th February 1991) and all subsequent Practising Certificates issued to the respondent were conditional upon the respondent delivering half-yearly Accountant's Reports to the Law Society, such Reports to be delivered within two months of the end of the period to which they related. The respondent failed to deliver the Accountant's Reports due from him for the periods ending 31st December 1992 and 1993

respectively. Notwithstanding such failure, the respondent practised as a solicitor at all material times.

18. Because the respondent failed properly to apply to renew his Practising Certificate, that for the practice year commencing 1st November 1991 was terminated by the Law Society on 15th February 1994. The respondent nevertheless continued to practise as a solicitor thereafter.
19. In the matter of Mr. & Mrs. M of Weatherby, had instructed the respondent to act on their behalf in remortgaging their property in favour of Northern Rock Building Society, and the respondent was also instructed to redeem the existing mortgage with Leeds & Holbeck Building Society. The respondent was instructed by both societies, and received the re-mortgage advance in or about March 1993. He failed to redeem the outstanding mortgage, but made mortgage payments on a monthly basis to Leeds & Holbeck Building Society purportedly on behalf of Mr. & Mrs. M. The respondent had not divulged his actions to Mr. & Mrs. M.
20. In January 1994, Mr. & Mrs. M received a mortgage statement from Leeds & Holbeck Building Society which mortgage they believed to have been redeemed. They made further enquiries and by letter of the 14th March 1994 they complained to the Bureau. The respondent had issued a completion statement to Mr. & Mrs. M indicating that the Leeds & Holbeck mortgage advance had been redeemed.
21. On 2nd February 1994, the respondent wrote to Mr. & Mrs. M and sought to explain the delays and went on to say, "I concealed my delays by sending a cheque each month to the Leeds & Holbeck. Late last year I thought there was an easy way out for me if you were to sell (i.e. I need never do the work at all)."
22. The respondent acted for Mr. & Mrs. T in their sale of a property in Bradford. He was instructed to redeem the mortgage in favour of Leeds Permanent Building Society upon completion of the sale. Exchange of contracts took place on or about 22nd November 1993 and completion took place on or about 3rd December. The respondent did not redeem the mortgage, despite requests by the Society that he do so. The Society complained to the Bureau by letter dated 15th March 1994. By 31st March 1994 the sum of £40,928.32 was required to effect redemption.
23. The respondent was instructed by Mr & Mrs B of Leeds. Their property was mortgaged in favour of National and Provincial Building Society. Mr and Mrs B instructed the respondent to redeem the mortgage and to act in the re mortgage in favour of Northern Rock Building Society. The respondent received the re mortgage advance of £60,000 on or about the 8th January 1993. He did not redeem the National and Provincial Building Society mortgage until the 23rd February 1994. The respondent had ceased to practice as a solicitor on the 23rd March 1994 following an intervention in his practice by the Law Society. The applicant believed he was no longer in practice and indeed was unemployed and in receipt of benefits. Shortly before the hearing the respondent had been adjudicated bankrupt.

The Submissions of the Applicant

24. The allegations made against the respondent revealed serious conduct unbecoming a solicitor.
25. At a time when there was a cash shortage on client account the respondent had put his own money into that account and then had used his own money to repay certain debit balances. Although that was a breach of the rules which were formulated to ensure that a solicitors' own money should not be mixed with clients' money, the applicant was not able to allege that the respondent had been dishonest in connection with the matters revealed by the first Investigation Accountant's Report. When the second investigation took place, Mr Halton at no time met the respondent. The respondent had two part time secretaries who relayed messages to the Investigation Accountant.
26. The Investigation Accountant had, despite the lack of the respondent's books, ascertained that there was a substantial minimum cash shortage on the respondent's client account.
27. The Bureau had required the respondent to file six monthly accountant's reports and he had failed to file those and as a result the Law Society had terminated the respondent's Practising Certificate on the 5th February 1994. It was clear from papers before the Tribunal that the respondent had nevertheless continued to practise as a solicitor even though he was not holding a current Practising Certificate. That was an offence under the terms of the Solicitors Act 1974. The respondent had been sent several reminders and he had ignored all of them.
28. The respondent had failed to pay monies which properly he should have paid and he had deceived clients and had sought to cover his tracks. As an example of that the respondent had paid monthly instalments of a mortgage which he had failed to redeem.
29. In the submission of the applicant the matters before the Tribunal represented a very serious case of conduct unbecoming a solicitor. The shortfall on client account which had been established was of huge proportions. Clients had been deceived not only as to their financial position but also in respect of substantial delays perpetrated by the respondent.
30. After the Tribunal had confirmed that they had found all of the allegations to have been substantiated, the applicant advised them of the position of the Law Society's Compensation Fund. Ninety nine applications had been made to the Compensation Fund which had at the date of the hearing paid out £664,204.77. The pending claims totalled £1,972,123.97. As at the date of the hearing recoveries had totalled £11,901.69. In addition the costs of the intervention up to the date of the hearing amounted to £25,017.94.
31. The Investigation Accountant's costs, a break down of which were before the Tribunal, amounted to £8,055.38. The applicant's costs including disbursements and value added tax amounted to £3,165.75. The Tribunal was invited to make such order as it thought right together with an order for fixed costs.

The Tribunal FOUND all of the allegations to have been substantiated.

On the 14th March 1991 the Tribunal found the following allegations to have been substantiated against the respondent. The allegations were that the respondent had been guilty of conduct unbecoming a solicitor in each of the following respects namely that he had:-

- (a) failed to maintain proper written accounts contrary to Rule 11 of the Solicitors Accounts Rules 1986;
- (b) contrary to Rule 8 of the Solicitors Accounts Rules 1986 he drew money out of a client account other than as permitted by Rule 7 of the said Rules;
- (c) failed to deliver Accountant's Reports notwithstanding the provisions of Section 34 of the Solicitors Act 1974 and the Rules made thereunder;
- (d) failed to comply with a decision of the Adjudication Committee.

The Tribunal then said that there was no doubt that it was of fundamental importance for a solicitor to keep records of clients' moneys held by him properly and up to date. It was said that the respondent himself recognised that the maintenance of proper accounts records was vital. The delivery of Accountant's Reports was equally vital. It was essential that the Law Society should be in a position to know that a solicitor's practice had complied properly with the Solicitors Accounts Rules and that no clients money had been placed in jeopardy. The Tribunal went on to say that the respondent was not to continue with what appeared an inappropriate attitude to his responsibilities. He had to ensure the correct keeping of clients' accounts. The Tribunal then ordered that the respondent pay a fine of £2,500.00 to be forfeit to Her Majesty the Queen and the costs of the application and enquiry to be taxed.

If the respondent's responsibility for clients money had not been apparent prior to the former disciplinary hearing then it must have been more than apparent afterwards. The respondent appears to have gone from bad to worse. The Tribunal is in no doubt that the respondent's behaviour was dishonest. He utilised clients' moneys for improper purposes, attempted to disguise what he had done by, for instance, making monthly payments to lenders in respect of mortgages which he had led the clients to believe to have been redeemed and which ought to have been redeemed. In correspondence the respondent had given assurances that he had not spent missing moneys on "high living", but huge sums of money have gone missing. Clients monies have been placed in jeopardy and, indeed, have disappeared. Clients would have suffered substantial losses if it had not been for the Law Society's Compensation Fund which meant that the rest of the solicitors' profession had to pay out large sums of money to ensure that the respondent's own clients had not been prejudiced by his actions. Such behaviour on the part of a solicitor was reprehensible and intolerable. The Tribunal Ordered that the respondent Simon Edmund John Kaberry, be Struck off The Roll of Solicitors and they further Ordered that he should pay the costs of and incidental to the application and enquiry in the total fixed sum of £11,221.13p inclusive.

DATED this 18th day of September 1995

on behalf of the Tribunal

A handwritten signature in cursive script, appearing to read 'K I B Ycaman', written over a horizontal line.

K I B Ycaman
Chairman

September 26th 95